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Observers of the administrative state warn against “capture” of administrative agencies and lament its disastrous effects. This article suggests that capture has another side: important benefits that should not be underestimated.

Capture is a situation in which a regulated industry exerts a substantial amount of influence over the agency in question, leading to industry involvement in creation and enforcement of regulation. Scholars documenting the phenomenon have highlighted a number of negative results – lax enforcement of regulation; weak regulations; illicit benefits going to industry. However, not only is this picture incomplete, it is in substantial tension with another current strand of literature which emphasizes and encourages cooperation with industry in several forms – through self regulation, public/private partnerships, and voluntary compliance programs, among others. The reason for this different trend is that industry input into and influence on the regulatory process has important benefits for the regulatory state. Industry usually has information no one else has, and has more incentive to give that information to a friendly regulator. Furthermore, working with industry can substantially improve the impact of regulation: voluntary compliance is cheaper and can be more effective than enforced compliance, and industry can help regulators minimize negative unintended consequences. This paper argues that the bad name capture has is simplistic. Capture can substantially improve regulatory outcomes. That is not to say the dangers of capture are not real. But the focus of scholars should be on identifying which factors contribute to the benefits of capture, and which contribute to its harms, and on the net effects - not on wholesale denunciation.

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1 Associate Professor, UC Hastings College of the Law. I would like to thank: Ash Bhagwat, David Coolidge, Annie Daher, Evan Lee, Ethan Leib, Reuel Schiller, David Schorr, Brendon Swedlow, and ... for invaluable comments on earlier stages of the project, and Fatemeh Shahangian for her excellent research assistance. All errors are, of course, my own.
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Introduction

For decades, scholars discussed capture of administrative agencies – mainly, though not exclusively, by industry\(^2\) - and its negative consequences.\(^3\) If “accountability” is often seen as the “hurrah word” of the

\(^2\) Scholars have also discussed concerns about capture by NGOs and other interest groups. See, for example, Richard L. Revesz & Allison L. Westfahl Kong, Regulatory Change and Optimal Transition Relief (New York University 2010); Dieter Helm, Regulatory Reform, Capture, and the Regulatory Burden, 22 Oxford Review of Economic Policy 169, (2006). However, most of the scholarship focuses on the connection between industry and the regulator, and the case studies explore that situation. I will therefore use language focusing on industry, while acknowledging that there can be capture by other actors.

administrative state, capture can certainly be seen as the "boo-word": today or before, few have anything good to say about it.

However, capture is not all bad, as other strands of literature suggest. It can be useful in at least two ways: it can improve the information available to an agency and it can improve regulatory results by increasing compliance and preventing negative unintended consequences. This is why a substantive literature in the last decades promotes more collaborative government, with closer ties and even partnerships between the private sector and their regulators – an approach that at least increases the potential for capture.

For example, since 1976, the FAA had been making use of voluntary reporting programs to allow airlines and airline personnel to report safety problems in return for a guaranteed waiver of sanctions. Between 1990-2009 the FAA entered into agreements for voluntary reporting programs with 73 carriers. In 2001 the FAA enacted a regulation guaranteeing that safety information voluntarily submitted to the FAA will not be used for punitive actions by the regulators nor be released to third parties under the

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4 MARK BOWENS, Public Management and Public Accountability, in The Oxford Handbook of Public Management 182, 182, (E. Ferlie, et al. eds., 2005): “As a concept, however, “public accountability” is rather elusive. It is a hurrahword, like “learning,” “responsibility,” or “solidarity”—nobody can be against it.”.
5 See text near footnotes for a discussion of the more "optimistic" strands of literature about capture.
6 Except in narrow circumstances. FAA would not waive sanctions for problems resulting from criminal behavior), or for problems disclosed in anticipation of an FAA inspection or during one.
8 14 CFR §193.
Freedom of Information Act. This removed a substantial source of concern the airlines had in relation to the voluntary reporting programs and increased the use of such programs. Cynics would say this is exactly what industry wanted, and clearly the result of capture. It allows airlines to get away with violations of safety regulation without sanction because their close connections with the regulators assure them there will be none. But what were the effects?

Allowing the airlines to disclose information without penalty increased the availability of information. In 2008 the programs generated over 1200 reports on systemic problems in aviation safety systems, allowing the FAA to take action on these issues. As pointed out by the Government Accountability Office, such data provides information that cannot be found in any other way. It may have led to less punitive measures against airlines, but if the goal is to increase the safety of air travel– not just punish airlines – it seemed to have achieved it.

An independent review team said, about these programs:

9 5 U.S.C §552.
10 Mills, p. 30
11 Also fitting in with Michael R Cohen Why error reporting systems should be voluntary: They provide better information for reducing errors The author argues that when disclosure is used primarily to punish the wrong doer (creating a “fear of retribution”) rather than creating solutions, it has a stifling effect on disclosure: “non-punitive and confidential voluntary reporting programmes provide more useful information about errors and their causes than mandatory reporting programmes…Practitioners who are forced to report errors are less likely to provide in depth information because their primary motivation is self protection and adherence to a requirement”
13 Aviation Safety: Improved Data Quality and Analysis Capabilities Are Needed as FAA Plans a Risk-Based Approach to Safety Oversight GAO-10-414 May 6, 2010 Add full citation.
We are phenomenally impressed with what this agency has achieved, in collaboration with the aviation industry, in driving accident rates down to extraordinarily low levels.  \(^{14}\)

Another example from a non-American context is the story of Électricité de France (EDF). EDF is a prime example of a company with tremendous political power.  \(^{15}\) The ministry nominally in charge of it would simply accept and enact regulations written by the company. There was, of course, a give and take there; EDF was expected to serve the public interests and political will. And it did so in several ways: it kept prices low, sacrificing potential additional profits; it initiated and ran extensive programs of monetary aid to low income customers. But it had substantial freedom in running the company and setting energy policy.

The results? France has the lowest electricity prices for domestic users in West and Central Europe, except for Greece.  \(^{16}\) France has the lowest electricity prices for small business in the European Union.  \(^{17}\) For large industrial users, only Estonia has a lower price.  \(^{18}\) France has not had a widespread blackout (though it did have localized blackouts) since 1978.

\(^{16}\) Based on the data collected by the European Union, found on the EU energy portal, [www.energy.eu](http://www.energy.eu), last visited on May 25, 2011. This cannot be credited only to EDF, of course. A big part of the reason is France’s extensive use of nuclear power. But under the traditional view of capture, EDF should have been hogging the profits, and as a strong monopolist raising prices and cutting costs of maintenance, leading to bad quality services. That didn’t happen.
\(^{17}\) Id.
\(^{18}\) Id.
France produces enough electricity to be a net exporter. It has one of the lowest CO2 per capita emissions in Europe.

What both these examples suggest is that the policy results of capture can be positive. At the same time, the risks scholars point to in capture are real enough, as developed in section I.b. This paper is not trying to say that capture is universally good. However, in a way reminiscent of the move done by the comparative institutionalist literature, it suggests that capture should not be evaluated in a vacuum. Rather we should ask what are the realistic alternatives, and which realistic alternative will achieve the best result. Sometimes, capture will achieve better results than other options. Other times it will at least achieve results that are good enough, or better than the previous status quo. Unless you believe industry influence is per se evil a blanket condemnation of capture is unjustified.

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19 Soult, 2003 #1449].
As with every other regulatory phenomenon or institution, the question should be not how do we get rid of capture but how do we maximize its benefits and minimize its risks.

Part I defines capture and explains the concerns that made “capture” such a problematic concept in the context of the administrative state. Part II demonstrates that the current trend in governance has been to increase the kind of collaboration with industry that could lead to capture and addresses the differences between collaboration and capture. Part III explains the potential benefits of capture, making the core argument. Part IV suggests some factors that could affect whether capture will have more risks or more benefits.

I. Capture and its Attendant Risks.

I.a Defining Capture

Capture focuses on close connections between a regulator and the industry it regulates.\(^{24}\) In a situation of capture the regulated industry members “persuade regulators to alter rules or be lenient in enforcing those rules”.\(^{25}\) Capture can therefore affect the way regulation works at two stages. Ex-ante the capturing industry will have substantial (implied:


undue) influence on the content of regulations.\textsuperscript{26} In addition, after a regulatory regime is already in place (ex-post), capture can lead to substantial industry input into enforcement, usually seen as leading to lax enforcement by a regulator too close to industry to be willing to take punitive measures.\textsuperscript{27}

Implied in this definition are repeated interactions between the regulator and a certain industry: capture isn’t usually an issue when interaction between the industry and the regulator is sporadic.\textsuperscript{28}

The type of relationship has been known for a long time among those inside the regulatory state. In an open letter about the ICC, a famous practitioner acknowledged that:

> The Commission, as its functions have now been limited by the courts, is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to be to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people

\textsuperscript{26} See, e.g., ETZIONI;WAGNER;GEORGE STIGLER, \textit{The Theory of Economic Regulation}, 2 Bell Journal of Economic and Management Science 3, (1971).
\textsuperscript{28} Compare to NEIL GUNNINGHAM, Assessing Responsive Regulation ‘on the ground’: Where does it work? (2011). And see IAN AYRES & JOHN BRAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate 55-56 (Oxford University Press. 1995). (‘‘Where relationships are ongoing, where encounters are regularly repeated with the same regulator, corruption is more rewarding for both parties: the regulator can collect recurring bribe payments and the firm can benefit from repeated purchases of lower standards. Moreover, ongoing relationships permit the slow sounding out of the corruptibility and trustworthiness of the other to stand by corrupt bargains (and at a minimum risk because an identical small number of players are involved each time’’).
and a sort of protection against hasty and crude legislation hostile to railroad interests.”

Research on capture surged in the 1950s, with Marver Bernstein’s influential work on independent commissions. Bernstein suggested that while a regulatory regime starts vigorously and with energy, over time its supporting coalition dissolves, the energy dissipates, and the agency starts to kowtow to the preferences of industry, finally seeing its own interests as completely identical to that of the regulated industry.

Bernstein’s work was extremely influential, though not without critics from early on. In the subsequent public policy, capture was uniformly seen as a substantial concern. Even the more “optimistic” studies were optimistic by suggesting that sometimes agencies avoid capture or by challenging the prevalence of the phenomenon.

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30 Bernstein, supra note #, at Id, at pp. 83-101.
31 See PAUL SABATIER, Social Movements and Regulatory Agencies: Toward a More Adequate and Less Pessimistic Theory of “Clientele Capture”, 6 Policy Sciences 301, 303-305 (1975), for a summary of previous criticisms and an additional one. Among the criticisms mentioned is that often legislation is designed to promote close connections between industry and regulator and that Bernsteins’ assumptions that the agency cannot mobilize a supporting constituency to counteract industry influence and that the supporting coalition inevitably disperses or loses interest are problematic.
In 1971 capture was discovered by the economic literature with Stigler's seminal article, in which he claimed that regulation will, at the end, work for the benefit of the regulated industry, not the public, and that industry will have the most influence on its content. His approach was given some refinement and algebraic formulation by Peltzman.

The Stigler-Pelzman approach achieved prominence, followed by substantial follow up work. The literature on the causes and consequences was mostly theoretical, with scant empirical support. But capture became accepted as a given.

Much of the literature addressed the potential incentives industry can offer and their influence on industry. Another strand focused on the revolving door effects, strongly making the argument that movement from industry to the regulator and back leads to capture, to regulators wanting to carry favor with industry.

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36 Stigler, This article followed a previous article by Stigler and Friedland, in which they examined the effect of regulation in the electricity sector and concluded it had little effect. George J. Stigler & Claire Friedland, What Can Regulators Regulate? The Case of Electricity 5Journal of Law and Economics 1, (1962).
37 Id, add page numbers.
38 Sam Peltzman, Toward a More General Theory of Regulation, 19 Journal of Law and Economics 211, (1976). Among other things, Peltzman suggested that the influence of industry is in tension with other influences, and the result will usually not be completely caving to industry or to consumers, but somewhere in between – though it will lean towards industry. Id,
40 Dal Bò, 215-216.
42 Dal Bò, 207-213.
43 Id. at 214-215. Dal Bo also addresses two studies that suggested some positive influences to the revolving door (id).
Most of these studies accept “capture” as a reality, and a negative one, and discuss what leads to capture and how to prevent it.

In a study that straddled the economic and political science literature and challenged the regular view of capture Dan Carpenter suggested that deducing capture from regulatory results that seem to favor established firms is problematic, since there are other reasons for that kind of advantage.\(^4^4\) This will be taken up again later.

Providing a more sophisticated and nuanced approach, regulation scholar Braithwaite and several collaborators suggested that capture may be positive or negative, depending on the circumstances. As part of their discussion of “Responsive Regulation”, \(^4^5\) Ayres and Braithwaite discussed the idea of “tripartism”, \(^4^6\) suggesting NGOs can serve as a counter to industry influence.\(^4^7\)

The important part for this analysis is Ayres and Braithwaite’s analysis that there are some forms of captures that actually enhance social welfare and are efficient.\(^4^8\) They analyze two types of capture that might be beneficial, but the relevant one here is a situation where capture leads the agency and the industry to move from a situation in which neither cooperates – the firm evades the law, and the agency behaves in a punitive


\(^{4^5}\) AYRES & BRAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate 54-73.

\(^{4^6}\) Id; AYRES & BRAITHWAITE, Tripartism: Regulatory Capture and Empowerment.

\(^{4^7}\) See section II.b on the relation between this idea and my analysis.

\(^{4^8}\) AYRES & BRAITHWAITE, Tripartism: Regulatory Capture and Empowerment, 452-456; AYRES & BRAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate 65-69.
manner – to one where both cooperate: the industry works with the firm to obey the spirit of the law and achieve the regulatory goal and the agency moves to flexible enforcement, ignoring technical violations.\textsuperscript{49} This situation, explain Ayres and Braithwaite, “is clearly Pareto efficient... will unambiguously increase welfare” since it forces the agency to also consider the firm’s welfare when making decision – and the firm is part of society.\textsuperscript{50}

This analysis is based on theoretical game modeling, but a Braithwaite collaboration also added empirical support to the view that some capture is beneficial. A Makkai and Braithwaite’s article examined the concept of capture using empirical data from the Australian nursing home industry.\textsuperscript{51} Makkai and Braithwaite suggested that capture should be seen as a more complex concept than was previously suggest, including three factors: sympathy to problems industry confronts, identification with industry, and lack of toughness in enforcement.\textsuperscript{52} They found very limited evidence that ties with industry (coming from it or returning to it – the “revolving door” idea) increases capture, and what evidence they found suggested weak effects.\textsuperscript{53}

Makkai and Braithwaite then pointed out that:

“not all capture is bad. It surely is bad for regulators to believe that ‘what’s good for General Motors is good for America’; but it is also undesirable for regulators to believe

\textsuperscript{49} Ayres and Braithwaite, 1995, at 65.
\textsuperscript{50} Id.
\textsuperscript{51} MAKKAI & BRAITHWAITE.
\textsuperscript{52} Id, pp. 64-66.
\textsuperscript{53} Id, pp.69-72.
that ‘what’s bad for General Motors is of no consequence to America’. “\textsuperscript{54}

They explained why there are good reasons for a “revolving door” practice, with transfer between industry and the regulator (focusing mostly on regulators coming from industry, not regulators seeking to join industry).\textsuperscript{55}

Most literature, however, takes a strongly hostile view to capture – not surprising, given its very real risks described in the next section.

\textbf{1.b The Risks of Capture}

A recent case epitomizing the dangers of capture by industry is the story of the Minerals Management Service (MMS). \textsuperscript{56} The MMS received negative attention on two occasions between 2005-2010. In the first case, a lengthy investigation of its Royalties in Kind program exposed a series of ethical problems (described by the Inspector General of the Department of Interior as a “culture of ethical failure”\textsuperscript{57}). The MMS collected royalties from companies harvesting minerals from the continental shelf and some federal lands pursuant to leases. The Royalties in Kind program allowed the agency to collect the royalties in a percentage of the oil or gas collected and sell it

\begin{itemize}
\item \textsuperscript{54} Id, p. 72.
\item \textsuperscript{55} Id, pp. 72-73.
\item \textsuperscript{56} Following a reorganization in 2010, the agency was restructured and is now named the “Bureau of Ocean Energy Management, Regulation and Enforcement”. However, all the examples described here date from before the reorganization and the sources refer to the “Mineral Management Service”. I therefore considered it less confusing to use the old name.
\item \textsuperscript{57} Letter sent by Earl E. Devaney, Inspector General of the Department of Interior, Washington DC, to Secretary Kempthorne, on September 9, 2008, regarding “OIG Investigations of MMS Employees”. Copy on file with author.
\end{itemize}
itself. It is a substantial source of revenue. The investigation by the department of interior demonstrated a culture of receiving gifts from industry members, mostly of food, drinks and lodging (in violation of federal ethics guidelines), alcohol and drug abuse during industry-organized parties (in two cases agency members had to be lodged by the industry because they were too drunk to go home). There was evidence of relaxation of the rules in favor of the regulated companies, especially in allowing industry members to change bids after the fact.

To complete the picture of a captured agency in thrall to its regulatees, after the BP scandal substantial accusations of lax regulation and carelessness in providing BP with its drilling permit were aimed at the agency. Mary Kendall, Acting Inspector General for the Department of Interior, criticized MMS regulation as being “heavily reliant on industry to document and accurately report on operations, production and royalties” and pointed out that “[b]ecause MMS relies heavily on the industry that it regulates in so many areas, however, the possibility for, and perception of, undue influence will likely remain”.

59 Id.
60 Id.
61 Add full reference to her testimony from June 17, 2010.
The agency was criticized for granting BP an exclusion from preparing an Environmental Impact Statement, a practice that the agency engaged in quite often.\textsuperscript{62}

These episodes from the MMS seem to demonstrate many of the risks associated with capture: an agency regulating in favor of the industry it is supposed to supervise, allowing the industry to set the terms of engagement, relaxing or twisting the rules in favor of industry, and in the most extreme case of close, friendly connections - even becoming corrupted by industry.

The following sections elaborate on these risks by drawing on existing studies, separating out the two aspects of capture mentioned in section I.a: industry involvement in regulation and industry involvement in enforcement.

Starting with industry influence on regulation, many studies of rulemaking in the United States found substantive influence by industry on the content of regulation.\textsuperscript{63} In a recent study Shapiro and Steinzor not only

\begin{itemize}
\item \textsuperscript{62}GAO, Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act, GAO-09-8721 23-26 (Washington D.C.: Sept. 16, 2009). Available online at: http://www.gao.gov/new.items/d09872.pdf (last visited May 20, 2011). Section 390 to the Energy Policy Act of 2005 allowed the Department of the Interior’s Bureau of Land Management (BLM) to grant oil company categorical exclusions from creating an environmental assessment or an environmental impact statement under the National Environmental Protection Act (NEPA) \textit{add reference}; the goal was to simplify and streamline the process approving certain oil and gas activities. Id, pp. 1-3.
\end{itemize}
found such influence, reviewing recent literature, but explain that it is especially strong where salience is low and technological complexity high.\textsuperscript{64} Justifications for regulation include correcting market failures, e.g. by limiting monopolies and cartels\textsuperscript{65}; protecting the environment, public health or other important values against economic interests of private firms;\textsuperscript{66} and spreading the costs of public goods.\textsuperscript{67} Achieving any of these goals requires the regulators to limit activities of industry or place burdens on industry. Industry members naturally want to increase their profits – in fact, it can be argued that they have a duty (to their shareholders) to do so.\textsuperscript{68} Their involvement in the content, therefore, can be expected to be in tension with regulatory goals. In a monopoly situation industry will want to

\textsuperscript{64}SHAPIRO \& STEINZOR, 1752-1755.
\textsuperscript{65}HAINES;DAVID LEVI-FAUR, Regulatory Capitalism: The Dynamics of Change beyond Telecoms and Electricity, 19 Governance, (2006).
\textsuperscript{67}Add references.
place barriers on new entrants to the market and make access difficult.\(^6^9\)

For example, one of the common struggles in relation to telecommunications liberalization is to allow potential new entrants access to the existing network, to prevent them from having to invest the tremendous costs of creating a network anew. \(^7^0\) Research found that opening the market to competition required regulation to prevent the incumbent from setting access prices too high (abusing their market power). \(^7^1\) Close connections between the incumbent and the regulator can lead to setting the access prices high. \(^7^2\)

When it comes to protecting other important values (such as health, safety, or the environment) industry will want to minimize their costs, and therefore, goes the claim, its influence will lead to ineffective, weak and watered-down regulations that do not adequately protect health, safety, or the environment. For example, one study suggests that because of industry influence the Food Safety and Inspection Service in the United States

\(^6^9\) And see CARPENTER, 613. (focusing on the entry-barrier aspect of capture)


Department of Agriculture had done nothing in relation to E.Coli contaminated meat for over a decade (1982-1995). This in spite of repeated outbreaks of illnesses related to E.Coli and a report by the National Academy of Sciences, until a very widespread outbreak of E.Coli traced to contaminated meat had widespread effects (including the deaths of two children).\(^{73}\) Even then, the final rule was a watered down version of the original rule, with most of the effective protections removed, because of intensive efforts by industry to achieve just that.\(^{74}\)

Similarly, Etzioni\(^{75}\) suggests that a rule by the department of transportation allowing railroads to choose the routes acceptable for dangerous cargoes based on their own weighing of the factors involved (including the costs) was “profoundly shaped” by the railroad industry (and he cites a claim by Melberth from OMBWatch that the lobbyists from the industry actually provided the text of the rule).\(^{76}\) This rule, according to critics, prevented re-routing of dangerous cargoes around major cities, including those designated by the DHS as targets for future terrorist attacks – thus potentially endangering lives.\(^{77}\)

Similarly, when in 2000 the FDA prepared to publish information about the mercury content of various food, the tuna industry – realizing


\(^{74}\) Id, 153-156.


\(^{76}\) Id, at 320.

\(^{77}\) Id.
canned tuna was going to rank as dangerous – lobbied the FDA. The FDA recalibrated its categorization and an FDA official, Clark Carrington, admitted that the staffers designed the three categories of mercury danger so that canned tuna fell into the “low” category to “keep the market share at reasonable level.”

When it comes to licensing and rate-setting industry will want a lax regime that provides it with maximum freedom. For example, in his study of railway prices Huntington demonstrated that since the late 1920s the ICC, captured by railroads, consented to any rate increase the railroad wanted. Not exactly similar but related, in a relatively recent case two environmental groups challenged an EPA rule that allowed coal companies to clean up abandoned mines for alleged violations of the Clean Water Act’s pollution reduction requirements. A company wishing to “remine” a mine needs a permit from the EPA. The rule addressed the requirements for such a permit, and especially the requirements protecting water quality. The rule did not set specific standards for drainage but required a Sediment Control Plan specific to the site approved by the authority issuing the permits. The plan will identify best management practices and specifics of

79 Id.
80 HUNTINGTON, 481.
82 33 United States C. § 1251 and on.
the design, construction and maintenance of the operation. To receive a permit, the discharges were required not to exceed the levels of discharge in place when the mining began, i.e. not to make things worse. But there is no requirement to make sure that the levels are the best possible. The environmental groups saw this as problematic and “industry-friendly”, not sufficiently protective of water quality and the result of capture.

Those concerned about capture highlight the need to prevent industry from weakening regulation. However, getting strong, pro-consumer regulations is only the first step in achieving the results of regulation. The complexities and uncertainties accompanying implementation and enforcement led to extensive scholarship on enforcement of regulations and compliance with them, starting with Pressman and Wildavsky's classical study and continuing much beyond.

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83 40 CFR §434.82.
84 40 CFR §434.72(b)(1). Mullen, supra note 81, p. 944.
85 Mullen, supra note 81, p. 929. I have to admit I sympathize with the court’s view, which suggested that this is a reasonable compromise between wanting to protect water quality and wanting to allow remining, a practice that also has substantial environmental benefits.
86 JEFFERY L. PRESSMAN & AARON WILDAVSKY, Implementation: How Great Expectations in Washington are Dashed in Oakland; Or, Why It’s Amazing that Federal Programs Work at All 220 (University of California Press 3rd ed. 1984):.
Implementation is another area where those concerned about capture see its insidious effects. Due to the close relationship between the regulators and the regulated companies, goes the claim, the regulators will be unlikely to do their job and rigorously enforce the regulations.\textsuperscript{88} They will be unwilling to penalize their good friends in the industry. On the contrary, they may seek to please and promote those to whom they are personally connected. After all, “Chinese walls fall in Chinese restaurants”\textsuperscript{89}. This is especially true where there is an exchange of personnel and close interpersonal connections between agency members and industry members. Indeed, much of the economic literature about capture focuses on the negative effects of the “revolving door”, people moving between industry and the regulators.\textsuperscript{90} This tendency was described by the Department of Interior’s Acting Inspector General, Mary L. Kendall, as part of the reason for the ethical problems discovered in the Minerals Management Service, where there was “a culture where the acceptance of


\textsuperscript{89} Quoted from Prof. Zohar Goshen’s corporate class, Faculty of Law, Hebrew University, 1998.

gifts from oil and gas companies were [sic] widespread throughout that office”:

“Of greatest concern to me in the environment in which these inspectors operate – particularly the ease with which they move between industry and government… we discovered that the individuals involved in the fraternizing and gift exchange – both government and industry – have often known one another since childhood. Their relationships were formed well before they took their jobs with industry or government.”

Even without corruption, close connections can foster excessive trust that will lead to accepting the words of the industry at face value and therefore not finding out about violations. Indeed, much of the economic literature about capture focuses on the negative effects of the “revolving door”, people moving between industry and the regulators. For example, in relation to the Federal Aviation Administration (FAA) a report by the Nader group found that FAA inspectors often missed industry violations because they relied on paperwork provided by the industry to discover problems, and the industry would lie in writing, a practice termed “paper whipping”.

Even a more positive article about the FAA described such concerns. Under the FAA’s Air Transportation Oversight System (ATOS) the FAA kept a specific team of inspectors housed in the major maintenance facility of a

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92 Letter from Mary L. Kendall, Acting Inspector General, Department of the Interior, to Secretary Salazar, May 24 2010, attached to report, on file with author.
93 Dal Bó, 214-215, 217-218; Sparrow, 35.
specific carrier. This approach allowed the inspectors to know much about the airline they oversaw, but also allowed the development of close personal connections between airline personnel and an inspector. In 2007, a large number of Southwest Airlines planes were found in violation of an airworthiness directive and some had cracks. Apparently, an FAA inspector warned of the cracks as early as 2003, but nothing was done because of the close relationship between the Principal Maintenance Inspector (PMI) Douglas Gawadzinski and senior management at Southwest Airline. The connections were so close that FAA personnel allowed Southwest to fly problematic aircraft and even warned them in advance of upcoming inspections.

In April 2011 a tragedy was narrowly averted when a Southwest plane was forced to an emergency landing because of a failure of fuselage skin — the result of fatigue cracks; the cracks themselves are not a problem, but if not dealt with they can lead to failure of a cracked part. This may be seen as indication that the FAA and Southwest have returned to their cozy relationship with potentially dangerous result, but not necessarily: mistakes can be made even without capture. The FAA’s response to the

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96 Airworthiness directives are rules through which the FAA requires airlines to employ certain safety measures in certain types of aircraft.

97 Id, 4-6.

near accident was to immediately issue an emergency directive reviewing
certain aircraft with more than 30,000 life cycles, which may not support a

In another example, the Bureau of Land Management, the agency handling on-shore oil drilling, was found by the Government Accountability Office (GAO) to regularly approve drilling permits without an Environmental Impact Statement, relying on exclusions provided in section 390 of the Energy Policy Act.\footnote{GAO, Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act, GAO-09-8721 (Washington D.C.: Sept. 16, 2009). Available online at: http://www.gao.gov/new.items/d09872.pdf (last visited May 20, 2011.).} The GAO found that MMS used such exclusions in more than a quarter of drilling permits between 2006-2008,\footnote{Ibid, p. 23-29.} frequently “out of compliance with both the law and BLM’s implementing guidance”.\footnote{Ibid, p. 29.} The GAO did not attribute these deviations to wrong doing –

“We did not find intentional actions on the part of BLM staff to circumvent the law; rather, our findings reflect what appear to be honest mistakes stemming from confusion in implementing a new law with evolving guidance”\footnote{Id, p. 29.}

Preparing an Environmental Impact Statement according to the National Environmental Policy Act\footnote{Add reference} is costly and difficult, and removing it
is a break for industry; but it raises concerns about adequately identifying environmental consequences and thus environmental protection. In fact, the Environmental Protection Agency and environmental groups expressed concerns that granting exclusion increased air quality problems in a number of states.\textsuperscript{106}

Similarly, as mentioned above, the Minerals Management Service has, apparently, granted an exclusion from NEPA to BP's drilling in the Gulf of Mexico, a drilling that ended with a catastrophic, far reaching oil spill.\textsuperscript{107} The natural accusation is that cozy relationships between the agency and the company led to lax enforcement of the legal requirements, sacrificing the environment to the company's interest. According to a member of an environmental group quoted in the article,

"The agency’s oversight role has devolved to little more than rubber-stamping British Petroleum’s self-serving drilling plans."\textsuperscript{108}

\section*{II Let’s take the risk: The Scholarship}

The risks described above may lead the reader to believe in advocating for a complete separation between regulators and industry, a coalition of citizens as a watchdog for every agency,\textsuperscript{109} and suspicion of every non-conflictual contact between the regulator and industry. There are echoes of that in the literature described in section I.b; but that is not

\begin{flushleft}
\textsuperscript{106}GAO report, supra note 102, p. 36.
\textsuperscript{108}id. The speaker is Kieran Suckling, executive director of the Center for Biological Diversity.
\textsuperscript{109}The solution suggested by Sabatier, supra note ##, at 326.
\end{flushleft}
the general approach of regulators, or the recommendation in the
literature. Especially in the past decades a whole strand of literature has
promoted reforms that seem to increase the risk of, or potential for,
capture, and several such reforms have been put into practice110

The next section describes the theoretical literature and some
examples that put this into practice. The section after that analyzes the
difference between the collaboration promoted by the literature and
capture, concluding it’s not that big in many circumstances.

II.a Capture-Facilitating Literature

A whole line of literature in the 1990s promoted self-regulation by
industry as a way to make regulation more efficient and flexible, especially
in light of the overload of regulation and the acknowledged problems of
command and control models.111 In the UK, The Financial Services Authority
strongly promoted “principles-based regulation”,112 in which the regulator
sets the principles and the industry fills in the gaps.113

110 ROBERTO PIRES, Promoting sustainable compliance: Styles of labour inspection and
111 NEIL GUNNINGHAM & JOSEPH REES, Industry Self-Regulation: An Institutional Perspective, 19
Law & Policy 363, 363-366 (1997); VIRGINIA HAUFLER, A Public Role for the Private Sector:
industry self-regulation in a global economy 4 (Carnegie Endowment for International
Peace. 2001). And see for a detailed analysis of self-regulation, its strengths and
weaknesses AYRES & BRAITHWAITE, Responsive Regulation: Transcending the Deregulation
Debate 102-128.
112 FSA Better Regulation Action Plan: What we have done and what we are doing, available
online at: http://www.fsa.gov.uk/pubs/other/better_regulation.pdf (last visited June 15,
2011) (copy on file with author) 6-7 (2005).
113 For discussion and criticism of Principles-Based Regulation (known as “PBR”) see JULIA
BLACK, Forms and paradoxes of principles-based regulation, 3 Capital Markets Law Journal,
(2008); CRIStIE L. FORD, New Governance, Compliance, and Principles-Based Securities
Both these forms of regulation intentionally leave it to industry to choose their own regulation – exactly the result if an industry strongly captures a regulator and gets it to write the regulation it wants. In fact, Paul Sabatier, writing about capture, describes capture as “de facto self regulation”. Within constraints and with some supervision, but a captured agency too would operate within constraints.

Other scholarship recommends “public-private partnerships” that will give more of a role to private industry in making policy. There are many studies criticizing conflictual, adversarial regulation as problematic, and promoting more negotiated, consensus based modes of regulation.

There have been quite a few experiments conducted of that nature. O’Leary et al give some examples:

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114 Sabatier, Supra Note ##, at 309.
The rapidly growing metropolitan area of Sacramento County, California, is expected to add a million people over the next 20 years. Such a growth rate raises questions about how the community can maintain mobility, enhance air quality, sustain economic prosperity, and preserve the Sacramento region as a livable community. To address concerns about transportation and air quality associated with this growth, county officials initiated the Sacramento Transportation and Air Quality Collaborative, an ongoing, multiphase project facilitated by the California Center for Collaborative Policy (www.csus.edu/ccp). As part of this project, 48 organizations representing business, government, and other interests participated in the design and implementation of Smart Growth policies.

In Oregon, a state-county collaboration led to successful wind farm siting. Wind energy permitting procedures are typically slow and require coordination among federal, state, and local governments, as well as private business, local residents, and advocacy organizations. When wind power developers targeted Sherman County, Oregon, as a potential development site, the governor initiated a community-level collaborative process. Local leaders convened a team of diverse individuals to implement a consensus-based process that would achieve economic, environmental, and community objectives. The 24-megawatt wind farm was built and continues to provide a renewable source of energy for the region.

When the U.S. Fish and Wildlife Service listed the Karner blue butterfly as endangered, the Department of Natural Resources in Wisconsin—where there is widespread distribution of the species—developed a statewide Habitat Conservation Plan that would maintain the butterfly habitat while allowing for compatible activities such as highway maintenance. The plan was drafted collaboratively by a group that included environmentalists; representatives of utility companies; leaders in the forest product industry; and local, state, and federal government officials. The concept of a statewide Habitat Conservation Plan was revolutionary, as almost all previous plans had been limited to a small geographic range and included only one or two landowners.

In California, the CALFED Bay-Delta Program involved 15 state and federal agencies and more than 2,000 residents in developing a collaborative agreement to restore ecological
health and improve water management in the San Francisco Bay Delta. It encompasses 70 percent of California and is the largest ecosystem restoration project in the United States.

* To address repeated flooding in the Northern Plains, the Federal Emergency Management Agency sponsored the International Flood Mitigation Initiative. The initiative brought together stakeholders in the United States and Canada to seek consensus on a regional flood management plan. The group produced 14 distinct initiatives, and implementation is under way.”

In one example of a program designed to give industry a direct input into the content of regulation, the Endangered Species Act has been a source of controversy between environmentalists and business supporters for a long, long time. An amendment to the act from 1982 allowed the Secretary to approve a Habitat Conservation Plan, allowing a landowner to interfere with an endangered species (“take” it) under certain conditions. In theory, the option is available to any kind of landowner, but most Habitat Conservation Plans were created by timber companies and real-estate developers. A Habitat Conservation Plan is, in essence, an official compromise between the private actor (usually a company) and the United States Forestry and Wildlife Service, the agency in charge of implementing the Endangered Species Act. It is, in essence, an invitation to business to participate in policy making. Do they actually protect the environment? The

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118 add reference to snail darter book.
120 id, 1090.
literature is undecided. Many studies express concerns and criticisms. Others express cautious optimism as to the process and its results.

There is even more support for flexible enforcement that takes into consideration industry’s interests and views. In 1982 Bardach and Kagan made a strong, compelling case for the “Good Inspector” acting with forbearance and enforcing regulation with flexibility (and toughness). In Responsive Regulation, Aryes and Braithwaite argued for a pyramid of enforcement that starts with persuasion and escalates in enforcement on the basis of industry behavior.

A movement emphasizing the use of Alternative Dispute Resolution tools in enforcement of regulation also emphasizes the need for more cooperation with industry in achieving compliance and less stringent, punitive enforcement modes.

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124 Ayres & Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 25-35. Ayres and Braithwaite expressly address the tension between their approach and capture and suggest a solution. That will be discussed in the next section.

More recently, we see programs that relax enforcement in exchange for voluntary cooperation. The EPA has experimented with a number of such programs, with mixed results.\textsuperscript{126} The FAA, as described below in more detail, has used voluntary reporting programs with some success.\textsuperscript{127}

If capture is so terrible, why do these very smart scholars promote or support things that increase its risks or create a potential for capture? As part III will describe, they have excellent reasons.

\textbf{II.b Capture v. Collaboration}

“No, no” you say, “That isn’t right”,\textsuperscript{128} these studies are talking about increasing collaboration. Collaboration isn’t capture. Well, what is collaboration? Definitions in the literature suggest that in the context of governance, collaborative governance sounds a lot like capture, i.e. sound a lot like bringing industry into the decision-making fold – in terms of both regulation and implementation.

A well known legal scholar defined collaborative governance as having five features, including requiring "information sharing and deliberation among parties with the knowledge most relevant to devising and implementing creative solutions":\textsuperscript{129}

\hspace{1cm}

\begin{itemize}
  \item [127] Mills.
  \item [128] Sandra Boynton, \textit{Moo Baa La La La 4} (Little Simon. 1982).
  \item [129] Freeman, \textit{supra Note ##}, at 22. The other features are: 2. Participation by interested and affected parties in all stages of the decision-making process. 3. Provisional solutions: seeing the policy making process as fluid and ongoing.4. Accountability that transcends traditional public and private roles in governance. “New arrangements, networks,
A definition of collaboration by a guide on collaborative governance, adopted by the editors of a symposium on collaborative governance in the Public Administration Review\textsuperscript{130} (the leading scholarly publication in public administration in the United States), says:

Collaborative: To co-labor, to cooperate to achieve common goals working across boundaries in multi-sector relationships. Cooperation is based on the value of reciprocity.\textsuperscript{131}

These authors clearly do not mean capture. But the definitions sound very similar. Some authors are very explicit on the similarities. Aryes and Braithwaite openly say that

The very conditions that foster the evolution of cooperation are also the conditions that promote the evolution of capture and indeed corruption.\textsuperscript{132}

Similarly, Shover suggests that “the establishment of cooperative relationships for the solution of problems” is one of the factors leading to capture.\textsuperscript{133}

In a more critical vein, an opponent of collaborative government described collaboration as:

\begin{itemize}
\item institutions, or allocations of authority may replace or supplement traditional oversight mechanisms. These might include self-monitoring and disclosure, community oversight, and third party certification." Id)5. A flexible, engaged agency. These features do not contradict capture as defined here, since they leave much to the informal give and take between industry and the agency and anticipate a close relationship.
\end{itemize}

\textsuperscript{130} O’LEARY, et al., 7.
\textsuperscript{131} HENTON, et al., 3.
\textsuperscript{132} AYRES & BRAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate 55.
\textsuperscript{133} NEAL SHOVER, et al., Enforcement or Negotiation: Constructing a Regulatory Bureaucracy 5 (State University of New York Press. 1986). See also: SPARROW, 11; BARRY M. MITNICK, The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms (Columbia University Press. 1980).
"the very entities subject to regulatory compulsion should engage in the design of rules that will dictate their conduct, self-monitoring for compliance with those rules, and self-enforcement when the entity discovers a violation of those rules."134

What, then, are the differences between collaboration and capture? Four things stand out.

The first and probably strongest point is that most of the pro-collaboration literature does not suggest allowing industry to be the only voice. In fact, most of them want industry to be a part of a dialogue in which interest groups are just as well represented and have at least as much influence. 135 This potential “countering” role for non-business interest groups is not a new idea, of course. It has been behind some of the move to more participatory government in the 1960s-1970s.136 But it is an integral part of the pro-collaboration literature of recent decades.

For example, Ayres and Braithwaite’s influential “responsive regulation” reserves an important role to NGOs serving as equal participants in the negotiation and enforcement of rules.137

137 AYRES & BRAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate 57-60.
For Sabatier, too, the solution to capture is participation of third parties, either initiated by the agency or initiated by the interest groups themselves.\textsuperscript{138} Other scholars have also shown positive influence of third party interest groups as a remedy for capture.\textsuperscript{139}

As I will elaborate in section IV, my approach is pragmatic. I believe in the art of the possible. In some cases, a third party interest group may be a viable alternative and a good counter to capture (or at least would have the potential to reduce the power of the capturing industry).\textsuperscript{140} In some cases, it will be an excellent option.\textsuperscript{141} However, it will not work in every case.\textsuperscript{142} At least in the American context, there is reason to be skeptical about it working in many cases.\textsuperscript{143}

First, it may not always be feasible. Ayres and Braithwaite believe a suitable NGO – defending the public interest or a relevant private interest -

\textsuperscript{138} \textit{Sabatier, 325-326;Berry, 525-526;Paul A. Sabatier, et al., Hierarchical Controls, Professional Norms, Local Constituencies, and Budget Maximization: An Analysis of U.S. Forest Service Planning Decisions, 39 American Journal of Political Science 204, 221, 226, 229 (1995).}


\textsuperscript{140} Peltzman points out that capture does not mean that the regulator will only follow the industry’s wishes – if there is a competing group, it might have some influence, but less than that of the capturing group. \textit{Peltzman, Toward a More General Theory of Regulation;Sam Peltzman, et al., The Economic Theory of Regulation after a Decade of Deregulation, 1989 Brookings Papers on Economic Activity. Microeconomics 1, (1989).}

\textsuperscript{141} For example, \textit{Sabatier, et al., Hierarchical Controls, Professional Norms, Local Constituencies, and Budget Maximization: An Analysis of U.S. Forest Service Planning Decisions.} demonstrates that there is strong influenced of community and environmental groups, in some cases equal to that of business groups.

\textsuperscript{142} As other aspects of responsive regulations may not work in every case – see \textit{Gunningham, Assessing Responsive Regulation ‘on the ground’: Where does it work?}. \textit{Sabatier, Social Movements and Regulatory Agencies: Toward a More Adequate – and Less Pessimistic – Theory of “Clientele Capture”}, for example, presents this solution as a sometimes available one, certainly not an always available one.
will generally be available. \textsuperscript{144} I am not so sure – and not just in the case of an NGO for the IRS that they consider.\textsuperscript{145} In the FAA contexts, the pilots’ union may be seen as a potential counter to the industry on matters of safety – but their interests on the issue are mixed, since they also have an interest in increasing jobs and the profitability of the industry, and they do not quite represent the public interest. On food safety, there is no general “let’s promote food safety” NGO. Similarly, what is the NGO promoting “honesty in dealing with the oil industry” in the context of MMS? Environmental organizations may be a watchdog for compliance with environmental requirements, but what about the rest? For many regulatory issues, the problem of diffused interests mentioned in the economic literature is all too real.\textsuperscript{146} Furthermore, the participation involved in being at the negotiating table requires resources – even if all information the regulator has is made available,\textsuperscript{147} the NGO will still have to invest in processing the information and involvement – especially in more complex regulatory areas, where there are many decisions. There may not always be a group with the required dedication or the ability to constantly engage. We can learn something about this from the United States notice and comment rulemaking process which provides an opportunity to at least somewhat

\textsuperscript{144} \textsc{Ayres & Braithwaite}, \textit{Tripartism: Regulatory Capture and Empowerment}, 444-445.

\textsuperscript{145} Id.

\textsuperscript{146} The argument is that for many regulatory issues, affected members of the public have too low a stake in the outcome to sufficiently invest in acquiring information and monitoring. \textsc{Peltzman}, \textit{Toward a More General Theory of Regulation}.

\textsuperscript{147} As suggested by Ayres and Braithwaite. \textsc{Ayres & Braithwaite}, \textit{Tripartism: Regulatory Capture and Empowerment}.
participate to any interested party. In spite of the apparently open access many studies suggest that industry participates more than others in this process. The same reasons that industry captures agencies operate here too. Industry has the most interest in the content of regulation – a long term, substantive interest, which allows it to stay involve after other participants left the field. Industry has substantial resources to invest in affecting the content of regulation, and strong incentives to do so. In some contexts, there will be an NGO with the same dedication and the ability to stick; in others there will not.

Furthermore, even where such an NGO is available, it will not necessarily solve the problem. One question (posed nicely by Ayres and Braithwaite) is who will guard the guardian: how do we prevent the capture of such an NGO by the regulated industry? Ayres and Braithwaite suggest as the solution a contested representation. This however requires not one, but multiple suitable NGOs able and willing to undertake the role.

Similarly, if an NGO exists that is willing to counter the influence of the capturing industry, it may improve the regulatory result – or not.

Depends which interests it represents. Not all clashes between private

150 Bernstein.
151 Id. at ; Sabatier, Social Movements and Regulatory Agencies: Toward a More Adequate – and Less Pessimistic – Theory of "Clientele Capture".
152 Ayres & Braithwaite, Tripartism: Regulatory Capture and Empowerment, 439-441.
153 Id.
interests protect the public interests. And everything has a price. 154 The cost of allowing a third party to counteract the influence of industry is additional delays, and potentially returning to a more conflictual process (depending on the level of trust between the different actors) – potentially undermining the goal of the collaboration to start with. Sometimes, the price will be worth paying. Other times, if the results of capture are good enough and the level of conflict high enough, it won’t be.

Besides the support for more than industry participation, collaboration differs from capture in other ways. Collaboration does not imply, as capture does, that the dominant partner is industry. It implies a partnership of equals. Capture suggests that industry usually gets its way, often because the agency really buys into the industry’s views. 155 This is an important difference but it seems more a matter of degree than of kind – how strong an influence does industry have in practice? And it may be hard to identify in practice – and does not undermine my suggestion that the collaboration literature facilitates and creates opportunities for capture.

The final difference is a difference in results. Collaboration implies a positive outcome; capture a negative one. But as a conceptual tool to identify capture, or as a way to distinguish the two phenomena, that leaves a lot to be desired. Results can only be known in hindsight. In terms of

154 Reference to Anne Bishop.
155 HANSON & YOSIFON. (explains that the second layer of capture is where the “interior situation of relevant actors is also subject to capture...targets include the way that people think and the way that they think they think)BERNSTEIN;AYRES & BRAITHWAITE, Tripartism: Regulatory Capture and Empowerment, 449.
normative judgment, they do not help assess the behavior itself. Especially since it’s not so obvious we can identify capture when we see it. First, identifying whether regulation works for the industry is not easy. In an early study, Ezioni challenged Stigler and Friedland’s early finding of capture of regulators by utilities\textsuperscript{156}, using the original data to arrive at the conclusion that regulation actually benefited consumers and therefore the regulators were not captured.\textsuperscript{157}

Even if regulation does work for the regulated industry, it is not at all clear capture is at work. In an innovative piece Carpenter demonstrated that there are other reasons besides capture that regulation may benefit large, established firms.\textsuperscript{158} These firms have real advantages – for example, they are more known to the regulator who can therefore make quicker decisions in relation to them, they may enter niches that are politically valuable earlier, and they can better withstand delays in decision making.\textsuperscript{159}

As a policy prescription, knowing the result in hindsight does not help you decide whether to fight capture or not. And as a matter of fairness, telling the agency after the fact “well, we thought you were collaborating and all is well, so we encouraged you to keep at it, but we see that in fact you were captured because things turned out badly, and therefore there will be consequences” is problematic.

\textsuperscript{156} STIGLER & FRIEDLAND, What Can Regulators Regulate? The Case of Electricity
\textsuperscript{158} CARPENTER, 614.
\textsuperscript{159} Id, p. 614 and on.
III. Capture: the Benefits, or What Can Capture Do for us?

While the risks of capture, as demonstrated by section 1.b, are real enough, industry involvement in writing regulations is a recurring phenomenon, as is flexible (or lax) enforcement. Many studies have found that regulators rarely act punitively and generally prefer to negotiate and work with industry rather than prosecute or punish it. And that is not just because of the problems of the administrative state: there are good reasons to want industry involvement in creation and enforcement of regulation, in spite of their risk.

The introduction to the article describes two instances where capture had arguably positive consequences – the FAA voluntary programs case, where allowing reduced sanctions for voluntary reporting increased information, and the EDF case, where industry dominant influence on regulation led to a well functioning electricity sector. These stories highlight the two reasons why close collaboration between agency and industry, to the level of capture (where industry gets to dictate what should be done) is desirable in spite of the real risks accompanying it. The first is that the best information about what is going on in industry is found in the hands of... industry. Collaboration is the surest way of getting that information. The second is that working with industry can lead to better results. It can lead to better results because enforcing compliance, without

160 See footnote 62, supra, and the accompanying text.
161 AYRES & BRAITHWAITTE, Tripartism: Regulatory Capture and Empowerment; GUNNINGHAM, Assessing Responsive Regulation 'on the ground': Where does it work; GRABOSKY & BRAITHWAITTE; SEIDENFELD; KEITH HAWKINS, Environment and enforcement: Regulation and the social definition of pollution (Clarendon Press. 1984).
cooperation, is costly and at best only partly efficient. It can also lead to better results because there is a societal advantage to minimizing industry costs, and often a balance between industry interests and other values is a positive thing – and allowing industry to be involved in creating and enforcing regulations can help achieve that goal.

**III.a Industry and the Information Advantage**

Good regulation requires good information. Not only is this self-evident, but the legal framework is designed to increase the information available to agencies. At least one goal of the notice and comment process the Administrative Procedures Act mandates for informal rulemaking is to provide information. Many of the other requirements added to the process require the agency to undertake research that will make its decision more informed.

The problem is that often the best information about what is going on in a given industry is in the hand of members of that industry. Agencies are regularly understaffed and over worked, a reality that is

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162 As pointed out by Ayres and Braithwaite, the regulated firm is also a member of society and increasing its welfare should count in calculating the effects of the general welfare. *Ayres & Braithwaite, Tripartism: Regulatory Capture and Empowerment*, 453.

163 For a description of the APA framework and its goals see *Stewart;Reiss;Reuel E. Schiller, Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Administrative Law Review 1139, (2001). A thorough discussion of the APA is beyond this paper.


165 Lubbers, text by footnotes 43-60.

getting worse in these days of budget deficits, this “age of austerity”\textsuperscript{167}, when agency resources are constrained and reduced by the other branches\textsuperscript{168}. They cannot, even with the best will, collect all the needed information about industry to either devise the best regulation or catch those who violate them. To use just a few examples, the FAA is, on its face, a large agency with over 50,000 employees\textsuperscript{169}. But most of these are air traffic controllers, and it has only about 3000 inspectors overseeing all the planes in the United States\textsuperscript{170}. The Food Safety and Inspection Service of the United States Department of Agriculture has to oversee the safety of meat and poultry in the United States, and the growth in meat consumption and sale left its inspectors overburdened – one author estimates that:

“At ninety-one birds per minute, inspectors have to examine over 12,000 poultry carcasses each day. It is estimated that inspectors have an average of just two seconds to inspect a poultry carcass and twenty to thirty seconds to examine a 2,000 to 3,000 pound beef carcass”\textsuperscript{171}

A similar claim had been made towards FDA’s resources\textsuperscript{172}.

\textsuperscript{167} \textit{P}AUL \textit{P}IERSON, \textit{From Expansion to Austerity: The New Politics of Taxing and Spending}, in \textit{Seeking the Center: Politics and Policymaking at the New Century}, (Martin A.; Landy Levin, Marc. K.; Shapiro, Martin M. ed., 2001). The term is used a little out of context here: Pierson uses it to discuss the possible retrenchment of the welfare state due to economic troubles of the 20\textsuperscript{th} century. However, it nicely reflects the current reality of financial crises and the need to tighten government spending – a reality felt at least for several decades.

\textsuperscript{168} \textit{S}HAPIRO \& \textit{S}TEINZOR, 1758-1762.


\textsuperscript{170} \textit{M}ILLS, 3.

\textsuperscript{171} \textit{C}ASEY. \textit{Supra note} 73, at 146.

It is easy to claim that the solution should be for Congress to provide more funding,\textsuperscript{173} but the chances of that happening are not very high in a political climate that calls for reducing government size.\textsuperscript{174}

Along the same lines, producing information costs money. And in an era of budget cuts the agency often has to choose between producing the information and doing other things. On the other hand, industry often needs the information in question for other purposes (e.g. information on safety problems in airplanes) and may be collecting it anyway. Getting the information from the industry can save money. But who will industry be more likely to provide the information to – the cop that monitors it, ready to punish it, or the friendly regulator that goes out to lunch with it?

Most importantly, even if an agency had all the personnel and funding it could wish for, its information would still be second hand (or third hand, since the information inspectors collect still needs to go up the agency hierarchy and be processed before it reaches central decision makers\textsuperscript{175}). It is the industry members that work on the ground and know what is really happening. They are the best spotters of problems, and the

\textsuperscript{173} \textsc{vladeck}, 984-985; \textsc{david schoenbrod}, \textit{the epa's faustian bargain}, 29 regulation 36, (2006); \textsc{thomas o. sargentich}, \textit{the critique of active judicial review of administrative agencies: a reevaluation}, 49 administrative law review, (1997).

\textsuperscript{174} \textsc{pierce}, 62-65.

\textsuperscript{175} and see \textsc{sabatier}, et al., \textit{hierarchical controls, professional norms, local constituencies, and budget maximization: an analysis of u.s. forest service planning decisions}, 207. – since information is costly to acquire and individuals have limited information-processing capabilities, information must be condensed as it moves up a hierarchy, which provides opportunity for distortion, usually to flatter officials and mirror their policy views. so the top may hold incomplete and biased views of situations.
first line of defense. The problem, of course, is that industry members will have no incentive to provide information that might later hurt them. They will have even less incentive to provide such information in an adversarial, punitive, hostile environment. On the other hand, if the relationship with the agency is good, industry will have more incentive to provide information and will be more willing to trust the agency with it, to try and convince it in non-conflictual ways of its point of view.

Of course, another solution to the “not having good enough information” problem is requiring industry to provide such information and heavily punishing those who do not. However, that may backfire. Industry can respond by providing too much information. Information, even when provided, needs to be processed and considered. In fact, one of the most common problems in the modern world is the problem of “info glut”, having too much information. Sorting through information also requires resources and can be very hard if the information is not well presented.

177 EDWARD P. WEBER & ANNE M. KHademian, Wicked Problems, Knowledge Challenges, and Collaborative Capacity Builders in Network Settings, 68 Public Administration Review 334, 343 (2008): “... using only government-based public managers and coercion to solicit information and bring about compliance may lead to short-term, high-cost successes at the expense of long-term problem-solving effectiveness...”
179 WAGNER, supra note #, at 90.
180 David Shenk, Data Smog: Surviving the Info Glut, 100 Technology Review 18, 18 (1997).
Information overload is not the only potential risk of coercive or punitive information gathering. As with any other issue, achieving compliance through coercion is neither simple nor straightforward. Getting the information through cooperation and voluntarily is more efficient and easier.\textsuperscript{182} There is at least one study that suggests it may incentivize industry to conduct more research.\textsuperscript{183}

Close connections between industry and the regulator can help with that problem.\textsuperscript{184} Reducing the level of conflicts may lead to industry being more willing to provide information, and thus also make information acquisition cheaper and easier. If industry is asked for information by a regulator with whom it has good connections it may also be more willing to provide the information in an accessible format. And if industry has a direct involvement in writing regulations, the regulation may be self-serving and weaker than it might otherwise be, but it will probably be informed. That will help prevent ineffective or erroneous regulation that may have substantial unintended consequences.


\textsuperscript{183} Mandatory versus Voluntary Disclosure of \textit{Product Risks, A. Mitchell Polinsky, Steven Shavell} NBER Working Paper No. 12776 voluntary disclosure induces firms to acquire more information about product risks because they can keep silent if the information is unfavorable

\textsuperscript{184} \textbf{Assessing Voluntary Programs to Improve Environmental Quality}
Anna Alberini; Kathleen Segerson \textit{Environmental and Resource Economics; Jun 2002; 22, 1-2; ABI/INFORM Global pg. 157 “Increased cooperation between polluters and regulators can improve information flows and reduce implementation lags” (p 158).}
At the same time, relying on the regulated industry for information raises at least two real problems. First, industry will probably provide information that supports its interests, or place the emphasis on the things that support it views, or present the information in a way that downplays contrary information. Industry may even do that without intending: a known cognitive bias is the confirmation bias, which suggests that people (or companies) tend to emphasize and be more receptive to things that support their initial point of view. Almost automatically, the tendency will be to downplay or ignore adverse information – to rationalize it away. This is not true just of industry – Sabatier pointed to the tendency of advocacy coalition to “resist” information that suggests their core beliefs are wrong or their preferred outcomes unattainable, and use information to support their preferred point of view. By the nature of things industry will tend to believe in, and provide, information that represents their interest in the best available light. Close connections do not reduce the risk of self-serving information – but neither does the absence of them. And close connections can increase the amount of information available. Even if self-serving, having more usable information is better than having less.

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186 ibid.
Another danger is that industry will lie.\footnote{BOEHM F. Regulatory Capture Revisited – Lessons from Economics of Corruption. Internet Centre for Corruption Research (ICGG) Working Paper No. 22, available at: http://www.icgg.org/corruption.research_contributions.html pp. 11, 16 (2007). That is also what the Nader report accuses the airlines of doing towards the FAA: NADER & SMITH.} You could argue that capture might increase the risk of lying because the industry will expect the agency to believe it and therefore expect the chances of getting caught to go down; but the risk of lying exists regardless of capture, and you can make a convincing argument that the industry will be more likely to lie – and feel justified in lying – if the government is “the enemy”\footnote{Bardach and Kagan – add citation.} than if the relationship is good, and especially if industry expects the regulator to have its best interests at heart.

A more subtle but just as real danger involved in capture is the effect of trust on the testing of information. The problem here that if the agency and industry have close connections, the agency may see information provided by its good friends in industry as reliable and not look further – not confirm or verify it. Even with a completely transparent, cooperative and honest industry, mistakes can happen and verifying information is useful and important. With anything less it’s crucial. For example, the “paper whipping” described by Nader and Smith can be traced in part to the FAA’s trust that the information they received from agency was reliable – which it was not.\footnote{NADER & SMITH. Supra note 94 at pp. 99-101.} Similarly, another Nader report – this time on the Food and Drug Administration – suggests that in relation to food additive the FDA bought into industry assumption and accepted without testing the
research done by industry, which was self-serving and misleading.\textsuperscript{191} Capture may make testing tricky: the agency may not want to undermine its good relationship with industry by scrutinizing the information it provides too closely or by asking hard questions. On the other hand, it should not be overstated compared to a non-captured agency. Even an agency that is not captured will have trouble carefully scrutinizing data provided by industry. Staffing problems and lack of inside information means agencies do not test most of the information they get from industry. Instead, they often rely on self-reporting. Capture can improve the quality of self-reporting since relationships work both ways: the industry, too, will not want to disappoint its regulator friends or jeopardize the connection.

At the end, it comes down to which problem would you rather face. Is it better to have more information, at the risk of that information being self-serving or even unreliable, or is it better to lack information and make mistakes because of that? If regulation is the art of the possible, lack of information makes very little possible. The information provided by a captured industry may well be partial and self-serving; but it’s more than the agency will have in a more conflictual scenario.

\textbf{III.b Capture and Regulatory Results: Compliance}

Capture can also improve regulatory results by improving compliance. Thoughtful students of regulation demonstrated that beyond a certain point, strict enforcement can backfire and lead to less, not more,
compliance. The reasons are that it can create resentment, which will lead to resistance and passive compliance. That is not to say that having strict sanctions is not useful; but it is useful most of all as a background, as a tool of last resource and as a background for strategies of negotiation and cooperation.

Many studies have demonstrated the limits and problems of coercive enforcement. As described by a recent work:

Research on second-generation regulatory agencies made clear to many that there are inherent shortcomings and limitations of strict rule-based enforcement. Investigators from Australia to the U.S. found that despite the content of regulations, oversight of business firms was exceedingly imperfect... It was obvious to a host of investigators that a rigorous deterrence-based approach to oversight of privileged offenders ... the level of political and fiscal resources it would require make it unlikely if not impossible.

Studies suggest that many agencies do not use punitive sanctions even when they are available - and if they do use punitive sanctions regularly, the costs – not just the direct costs, but the negative effects – can be very high.

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Voluntary compliance is, by many standards, better than punitive enforcement. It is cheaper – the agency does not have to invest as much in monitoring and in prosecuting wrongdoers. Punitive actions have costs, even if the process granted is purely internal – costs in terms of personnel and time, at least. In the United States many actions against wrongdoers also involve the courts,197 and litigation is expensive.198

Voluntary Compliance also has less negative side effects. Bardach and Kagan demonstrated the pitfalls of strict punitive enforcement – creating resentment on the part of the regulated, which see enforcement as arbitrary;199 leading the regulated companies, even the “good apples” among them, to just do what the regulator demands and not invest in additional responsible behavior;200 It can undermine cooperative problem-solving;201 and it can lead the regulated industry to give up on the rule of law.202

Capture – close relations between industry and regulator, and influence of industry on the regulator’s view of sanctions - certainly

197 For example, many enforcement actions by the EPA involve litigation. See 42 U.S.C 7413 or 42 U.S.C 9607; See also SHEP MELNICK, Regulation and the courts: the case of the Clean Air Act 200-201 (Brookings Institution Press. 1983);LYNN PETERSON, Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V, 17 Columbia Journal of Environmental Law 330 (1992).
200 Id, at 107-109, termed “minimal compliance” by Bardach and Kagan.
201 Id, 109-111.
202 Id, 112-116.
reduces aggressive enforcement. But it can also increase voluntary compliance – at a price, and with an attendant risk. If the industry is involved in writing the regulations, it presumably agrees to the content, and can be expected to comply with that content. If enforcement is flexible and negotiated with the regulated industry – if it’s done by agreement instead of by fiat – it is more likely the agreed upon modifications will be put in place.

The price is sacrificing some of the results that could be achieved by direct ordering. If industry is going to agree to a regulatory scheme limiting it or imposing costs on it, it will probably agree to less than the supporters of the regulation want – to what can be seen as watered-down regulation. In some circumstances the regulation may be watered down to such a degree that the result will be sacrificing the other values. But it does not have to be. Industry has other reasons for not going too far in weakening regulation. Among other things is the concern of reaction – if regulation is too weak, there may be a public backlash – at least if there is a bad result. The harsh reaction to the perceived cozy relationships between FAA and Southwest described above is one example: the pressure led the FAA to substantially increase its enforcement, possibly too much – in the following days it grounded large numbers of American Airlines planes too, disrupting travel. Concern about regulation had been a reason for industry to self-

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203 Makkai & Braithwaite; Grabosky & Braithwaite; Hawkins, Environment and enforcement: Regulation and the social definition of pollution.  
204 Supra note 15.
regulate. The same logic can lead industry to support a higher level of regulation than it would absent any outside pressures: better have a hand and cooperate (and be seen to cooperate) than have the regulations imposed on it. Furthermore, in many circumstances industry will be at least partly on board with the goal of regulation. In terms of the FAA, quite a bit of support for voluntary reporting programs came from the unions of pilots – pilots working for the allegedly capturing airlines. After all, safety is also an interest of the pilots and staff on the plane, not just the public. A similar point is true for nuclear plants: a nuclear explosion endangers the public – but also everyone in the plant. Other studies suggest that at least some corporations can have real commitment to social values, such as the environment. That is one justification for voluntary compliance programs, and some of them focus on “high performers”. From the point of view of the more socially conscious companies (the “knights”, drawing on LeGrand’s terminology), the absence of regulation may disadvantage them since it allows less conscientious companies to cut corners and thus produce products more cheaply; those companies may have an interest in pushing for stricter regulation.

205 Gunningham & Rees, Industry Self-Regulation: An Institutional Perspective; Haufler.
206 Mills.
208 Vidovic & Khanna; Alberini & Segerson. Add references.
210 Add references.
Furthermore, close connections with the regulator can exert another kind of pressure – a desire to do well by their regulator friends, or at least not to get them into trouble. Relationships, after all, work both ways. For example, in the case of EDF mentioned above the relationship with government resulted in lower prices than would be justified just by company interests.

Not only might the sacrifice be less than anticipated, there is, again, a question of “the art of the possible”. Sometimes, it is better to compromise on the content of the policy and end up with a policy that is easier to implement and more workable in practice than have a stronger policy that does not work. And as long as the goal of regulation is to achieve results and not just punish industry for being industry, or for being big industry, a compromise that achieves something may not only be the best possible; it is a positive thing. After all, strict enforcement or more adversarial mechanisms don’t usually achieve a hundred percent compliance either.211

III.c Capture and Regulatory Results: Unintended Consequences

Nobody plans regulation with the intent to harm an industry. For example, in spite of views to the contrary, the goal of environmental regulation is not to destroy any branch of industry or put workers out of

211 And see KAGAN, Adversarial Legalism: The American Way Of Law, where he demonstrates, citing extensive literature, that strict enforcement and adversarial approaches in the United States did not achieve better regulatory results than in other countries (p. ###) and very likely had to spend more time and money on achieving those results (p.##).
job. It’s to protect the environment.\textsuperscript{212} Unfortunately, sometimes the precautions needed to protect the environment, public health, competition or any of the other things regulation tries to achieve are costly. They can be costly in terms of direct monetary costs to the industry,\textsuperscript{213} or in terms of reducing an industry’s competitive edge compared to industry in other countries.\textsuperscript{214} They can be costly in other ways, for example, they can work to the advantage of large companies and against small business, thus pushing a sector towards oligopoly.\textsuperscript{215} They can have costs in directions unanticipated, for example, delay on large construction projects.\textsuperscript{216}

Capture can help. By strong involvement of industry in creating the regulation, and by allowing it substantial influence on the way regulation is enforced, it takes seriously concerns about negative effects on industry. When designing regulation, industry can warn agencies in advance of potential costs and work with them to mitigate such costs. Industry can negotiate enforcement that will not lead to unintended consequences.

At the same time, two risks are attendant. The first is that while capture allows us to take seriously the risks to industry from a certain kind

\textsuperscript{212} Does this actually need references? I think it’s pretty obvious.
\textsuperscript{215} \textsc{Grabosky & Bratthwaite; Cosmo Graham}, Regulating Public Utilities: A Constitutional Approach (Hart Publishing. 2000).
\textsuperscript{216} For a telling example, see Kagan’s description of the Oakland Port dredging and the effects the regulatory framework had on it - \textsc{Kagan}, Adversarial Legalism: The American Way Of Law 25-29.
of regulation, it may not give the same weight to unintended consequences for other groups, such as low income people or small business. The second is that capture may take such account of the risks to industry that the attendant regulation will not protect other important values – they will have no “bite”.

Again, the challenge is one of achieving the results without sacrificing too much.

**IV. Discussion: Factors Affecting the Results of Capture**

This discussion suggests that capture is not, per se, bad. It carries risks and can result in very bad consequences. But it has important benefits and some degree of close relationship, or even actual capture, may be necessary for a functional relationship between regulator and regulated industry.

As mentioned above, my approach is pragmatic. Regulation aims to achieve specific goals.\textsuperscript{217} Regulation is not in place to decorate shelves with rulebooks. Therefore, most discussions surrounding regulations rightly focus on what the results should be and how to achieve them. If capture can, in certain circumstances, promote those goals – or promote them better than other tools – it should be used for that goal.

In my view, the real question the literature should address is not how to prevent capture, but how to maximize its positive results and minimize its dangers. This paper does not contain the kind of research that

\textsuperscript{217} See Shapiro & Steinzor, 1741. on the reasons for regulation.
will answer the question, but I can suggest some tentative thoughts on what those factors may be.

First, salience matters. Capture is more dangerous in a less noticed agency than in one that is under scrutiny. The FAA regularly received critical media attention after air crashes, leading some commentators to see it as a “tombstone agency” – an agency that only acts when someone dies (and in proportion to the number of death). The negative attention provided a counter point to the close connections with industry, and also put pressures on both FAA and the airline industry – criticized together – to act. In that sense, capture, again, may be a benefit: when the pressure comes from outside the agency and is directed at both agency and industry, the close connections may make acting more effective: we have a common problem. Let’s solve it.

The pressures may have also served to justify FAA action to the airlines and reduce the negative effects on the relationship: we have to crack down on you – we’re both under attack. If we don’t do anything, others may – Congress may legislate harsher sanctions; power may be taken from us and given to another, more hostile regulator.

The MMS, on the other hand, was hidden from view of anyone outside Washington or oil companies until the scandals related to it (the accusations of corruption due to gift taking by its employees and the accusations of lack enforcement of environmental regulation in connection

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218 Cobb and Primo, supra note 169, at p. 17. See also Nader and Smith, supra note 94, at pp. 61-68.
to the BP oil spill) occurred – and even now, most people will have difficulty recognizing its name. With no external exposure, there was no reason for the agency officials identifying with industry to beware or act differently. And even then – in relation to the RIK program, at some point the rest of the administrative state caught on – and stepped in to correct the problem. When it arrived at the level of corruption, the capture was fixed “in-house” – and it didn’t take that long: the RIK program started in 2001, and the investigation began in 2006.219

Second, relationships matter. Capture will actually work better if there are close connections between the regulator and the industry – exactly the situation that raises the chances of capture – because then the industry will have more reasons to provide its good friends the regulators with reliable information, will be more understanding if public pressures force the regulator to demand things from it, and will hopefully sympathize more with the goals the regulators will want to achieve.

The ideal situation may be a close knit community of regulators and industry which is occasionally subject to public criticism.

Third, capture will provide more benefits if there is a credible possibility of sanctions in the background. This mirrors the famous “bargaining in the shadow of the law” insight:220 the existence of legal sanctions is a significant factor in the capture process.

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sanctions as an alternative to cooperation makes the result of cooperation closer to the content of the law.

Fourth, there is a question as to what is the alternative to capture. If an agency has enough funding and aid from external constituencies or the from other sources in enforcing rules, or is facing a very divided industry, it may get much done without capture. In that case, the risks may stand out more (though even there, the benefits are important). But if the agency is substantially undermanned for its assigned role or underfunded, capture may be the only way to get anything done. In that case, achieving what an industry is willing to give through cooperation and due to its good relationship with the regulator may be enough, or at least better than nothing.

In other circumstances alternatives to capture may exist – command and control regulation, or a very comprehensive process, may be possible – but capture will still derive more benefits, or derive them cheaper – and may be better.

In the words of Komesar:\footnote{KOMESAR, 6.}

The correct question is whether, in any given setting, the market is better or worse than its available alternatives or the political process is better or worse than its available alternatives. Whether, in the abstract, either the market or the political process is good or bad at something is irrelevant. Issues at which an institution, in the abstract, may be good may not need that institution because one of the alternative institutions may be even better. In turn, tasks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse.
If an institution works well, but others would work better, others should be used; if an institution has problems, but the alternatives are even worse, that institution is the best possible for the specific context.\textsuperscript{222}

In this context, sometimes capture will work better than any other alternative; and the question is really, what do we have to replace it with.

**Conclusion**

Concerns about capture are still very real, though these days, the belief in the value of collaboration provides somewhat of a counterargument. This article suggests a way to reconcile the extensive literature denouncing the dangers of capture with the literature emphasizing the benefits of collaboration, by suggesting that indeed, there is an overlap – at least a potential overlap – between capture and collaboration, but that overlap is not just a cause of concern: capture has its benefits.

This article can be read in two ways. It can be seen as an extremely depressing story: capture has serious risks, but the administrative state is so limited in its abilities that sometimes it’s the only way to get something done, and therefore better than nothing. On the other hand, it can be seen as leading to a much more optimistic view: capture is almost inevitable or at least very common in regulatory contexts, at least where there are repeated interactions between industry and regulators, and that is because

\textsuperscript{222} Id.
there are important benefits to it: it can lead to better information available to the regulatory state and better regulatory results.

I am not trying to express either extreme view. I believe capture could lead to very negative results, but also provide substantial benefits – and the devil is, as always, in the details: what is the relationship between the regulator and the industry, who else is on the playing field, what are we trying to achieve and what else is available. That means, however, that a blanket condemnation of capture is also problematic and can lead to sacrificing potential advantages.

The final thing this article is trying to do is formulate a research agenda. Most previous literature just assumed capture was bad and researched how to avoid it. I want to suggest we need to tackle the formidable task of assessing the real effects of capture on public policy. It is formidable because it requires defining what the “public good” is in the relevant area and assessing the effects on it – neither easy. But it is important. We also need to start thinking about the factors that lead to beneficial v. harmful capture.

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